United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

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P/S

74-2138

United States Court of Appeals

For the Second Circuit

JANET GOTKIN and PAUL GOTKIN, individually and on behalf of all persons similarly situated,

Plaintiffs-Appellants,

—against—

ALAN D. MILLER, individually and as Commissioner of Mental Hygiene of the State of New York, MORTON B. WALLACH, individually and as Director of Brooklyn State Hospital, CHARLES J. RABINER, individually and as Director of Hillside Medical Center, and MARVIN LIPKOWITZ, individually and as Director of Gracie Square Hospital,

Defendants-Appellees.

On Appeal From the United States District Court
for the Eastern District of New York

BRIEF FOR APPELLANTS

CHRISTOPHER A. HANSEN
Mental Health Law Project
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

BRUCE J. ENNIS
New York Civil Liberties Union
and Mental Health Law Project
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Attorneys for Plaintiffs-Appellants

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Docket No. 74-2138

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BRIEF FOR APPELLANTS

Statement of the Issues Presented

1. Did the District Court err in granting summary judgment after holding that, despite the common law right of a patient of access to her records, the hospitals could deny Janet Gotkin that right based on a policy of denying access to all former patients without regard to individual circumstances,

without due process safeguards, and without acknowledging their constitutional right to autonomy?

2. Did the District Court err in granting summary judgment upholding the constitutionality of the hospitals' policies despite the factual dispute concerning the nature of those policies and the factual dispute concerning the rationale for those policies?

Statement of the Case

On April 16, 1974, Janet and Paul Gotkin, appellants (plaintiffs), filed a complaint in the Eastern District of New York, individually and on behalf of all others similarly situated,* against Alan Miller, Commissioner of the Department of Mental Hygiene, Morton Wallach, Director of Brooklyn State Hospital, Charles Rabiner, Chairman of the Department of Psychiatry at Long Island Jewish-Hillside Medical Center, and Marvin Lipkowitz, Director of Gracie Square Hospital. (All appellees, including Dr. Miller, will hereinafter be referred to as either "the hospitals" or "the doctors.") The Gotkins sought to obtain judicial recognition of the right of Janet Gotkin and other former mental patients of access to their own hospital records. Appendix, pp. A-1 - A-9. Drs. Miller and Wallach filed motions for summary judgment. Appendix, pp. A-15, A-16. Dr. Lipkowitz filed

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*The determination of the appropriateness of a class action, like the determination of whether the actions of Drs. Lipkowitz and Rabiner are state action, was not reached by the District Court and will not be discussed herein.

a motion to dismiss or in the alternative, for summary judgment. Appendix,pp. A-39, A-40. Dr. Rabiner filed a motion to dismiss. Appendix, pp. A-49 - A-64. On July 25, 1974, Judge Anthony Travia construed all motions as motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and granted summary judgment for all the hospitals. The decision below is not yet reported but is reprinted in the Appendix, pp. A-72 - A-97.

Facts

The facts are detailed in full in the Complaint and the Rule 9(g) statements of both parties. Appendix, pp. A-9 and A-23 - A-26.

Undisputed Facts

Briefly, Janet Gotkin is an adult woman who was voluntarily hospitalized on several occasions from 1962-1970 at Brooklyn State Hospital, Hillside Hospital, and Gracie Square Hospital. The precipitating cause of many, though not all, of these hospitalizations was a series of suicide gestures, threats and attempts. Since September, 1970, she has not been hospitalized or received any treatment.

In April, 1973, she and her husband, Paul Gotkin, contracted with Quadrangle Books to write about her experiences with psychiatry.* In order to ensure factual accuracy of their

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* Tentatively entitled, Too Much Anger, Too Many Tears, A Personal Triumph Over Psychiatry.

book and to compare her recollection of incidents with that of the hospitals, Janet Gotkin wrote to the hospitals requesting copies of her hospital records. Two of the hospitals refused that request. One, Gracie Square, has never even answered her letter (though they have refused access through this litigation).*

Disputed Facts

The refusal of the hospitals to acknowledge Janet Gotkin's right of access to her own hospital records was the result of a state-wide policy which denies all former mental patients access to their own records, regardless of individual circumstances. The justifications advanced by the doctors for their policies are unconstitutional, find no support in the record, and are, in fact, contradicted by affidavits submitted by counsel for appellants. Appendix pp.A-27-A30. Moreover, there is no support in the record for a blanket policy denying all former patients access to their records without regard to individual circumstances.

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* The facts, thus far, are not seriously in dispute. However, the facts which follow are sharply disputed. See Section II, infra. Since the doctors were the moving parties herein, the facts will be stated in the way most favorable to Janet Gotkin. Holmes v. New York City Housing Authority, 398 F.2d 262 (2nd Cir. 1968), cert. den. 400 U.S. 853(1970). Appellants expect to be able to prove, at trial, all of the facts stated herein.

Introduction

This is a case of first impression. It is, however, part of a nationwide recognition by courts, government agencies, and society of the rights of persons labeled "mentally ill." That trend is the product of two factors; first, a recognition that the rights of persons so labeled have not been adequately recognized in the past. ("Considering the number of persons affected, it is perhaps remarkable that the substantive constitutional limitations on this power [civil commitment] have not been more frequently litigated." Jackson v. Indiana, 406 U.S. 715, 737 (1972)). And second, a recognition that the traditional stereotypes of persons so labeled, that such persons are and always will be dangerous and unpredicatable and must be protected from themselves, are false and destructive.

The United States Supreme Court has been instrumental in fostering this trend. See, e.g., Jackson v. Indiana, supra; Baxtrom v. Herold, 383 U.S. 107 (1966), Minnesota ex rel Pearson v. Probate Court, 309 U.S. 270, 277 (1940); Specht v. Patterson, 386 U.S. 605 (1967); Humphrey v. Cady, 405 U.S. 504 (1972); McNeil v. Director, Patuxent Institution, 407 U.S. 245(1972); Murel v. Baltimore City Criminal Court, 407 U.S. 355 (1972).

This Court, and the District Courts within its jurisdiction, have been in the forefront of increased recognition of the rights of persons labeled "mentally ill." See e.g., United States ex rel Schuster v. Herold, 410 F.2d 1071 (2nd Cir. 1971, Kaufman, J.); cert. den. 396 U.S. 847; Winters v. Miller, 446 F.2d 65 (2nd Cir. 1971), cert.den. 404 U.S. 984; Dale v. Hahn, 440 F.2d 663 (2nd Cir. 1971), cert. den. ___U.S. Law Week___ (October 21, 1974); Jobson v. Henne, 355 F.2d 129 (2nd Cir. 1966); Lombard v. Board of Education, No. 73-2057 (2nd Cir. July 22, 1974); Martarella v. Kelley, 349 F.Supp. 575 (S.D.N.Y. 1972); United States v. Adams, 297 F.Supp.596(S.D.N.Y. 1969); United States ex rel Von Wolfensdorf v. Johnston, 317 F.Supp.66 (S.D.N.Y. 1970); Gomez v. Miller, 341 F.Supp.323 (S.D.N.Y. 1972), aff. 412 U.S. 914; United States ex rel Daniels v. Johnston, 328 F.Supp. 100 (S.D.N.Y. 1971); New York State Association for Retarded Children v. Rockefeller, 357 F.Supp. 752 (E.D.N.Y. 1973); Stoner v. Miller, 372 F.Supp.177 (E.D.N.Y. 1974).

This Court has not been alone, however. Other federal courts have also acknowledged the need for expanding the recognition given to the rights of "mental patients." See, e.g., Lessard v. Schmidt, 349 F.Supp.1078 (E.D. Wisc. 1972); Wyatt v. Stickney, 344 F.Supp.373, 344 F.Supp. 387 (M.D. Ala. 1972); Welsch v. Likens, 373 F.Supp.487 (D.Minn. 1974); Souder v. Brennan, 367 F.Supp.808 (D.C. 1973); Heryford v. Parker,

396 F.2d 393 (10th Cir. 1968); Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), cert. granted ___U.S. Law Week___(October 21, 1974).

The state courts have also shown increased sensitivity to the rights of persons labeled "mentally ill." In New York, see, e.g., Kesselbrenner v. Anonymous, 33 N.Y.2d 161 350 N.Y.S. 2d 889 (1973); Whitree v. New York, 290 N.Y.S.2d 486 (Ct. Cl. 1968); Neely v. Hogan, 310 N.Y.S.2d 63(Sup. Ct. 1970); New York Health and Hospital Corp. v. Stein, 335 N.Y.S.2d 461 (Sup. Ct. 1972).

The courts are not alone in recognizing the rights of "mental patients." The United States Department of Justice has established a section devoted solely to enforcing the rights of "mental patients" and through that section has participated in many cases for that purpose. See, e.g., Stoner v. Miller, supra; Wyatt v. Stickney, supra; and New York State Association For Retarded Children v. Rockefeller, supra. The American Bar Association has recently established a special interdisciplinary committee on the rights of the mentally disabled and is now funding pilot programs of representation in this area. The Department of Health, Education and Welfare has financed and publishes a periodic collection and summary of important cases concerning the rights of the mentally retarded entiled M.R. and the Law. The National Institute of Mental Health, under Contract No. HSM-42-73-240 (OPC), has

funded a project to draft a model legislative guide for state mental health codes, which interestingly, in draft form (October 14, 1974), shows greatly increased recognition of the right of patients of access to their own records. Finally, numerous states, including New York, have revised their Mental Health codes, giving increased recognition to the rights of persons governed by such laws. See, infra, pp. 20-23.

The decision of the court below stands in marked contrast to this nationwide recognition that mental patients, too, have constitutional rights.

Appellants do not wish to personalize the issues in this case. But it is relevant and important to point out that Judge Travia, the judge below, has repeatedly adopted an unduly narrow view of the constitutitional rights of mental patients. For example, in Winters v. Miller, supra, Judge Travia's repeated refusal to recognize the religious freedom of mental patients was twice appealed to this Court, and twice he was reversed, with this Court suggesting the second time that he recuse himself. 446 F.2d 65 (2nd Cir. 1971) cert. den. 404 U.S. 985; 495 F.2d 839 (2nd Cir. 1974). Just a week or two after that, this case was assigned by lot to Judge Travia. Even more recently, this Court has found it necessary to reverse Judge Travia's ruling that a teacher alleged to be mentally ill "had no protected interest entitling him to due process." Lombard v. Board of Education, supra.

In Lombard, this Court found that "summary judgment was inappropriate." We will show that summary judgment was equally inappropriate in the circumstances of this case.

As noted earlier, supra,p.5, the increased recognition given to the rights of persons labeled "mentally ill" is in part due to the increased recognition that the traditional stereotypes of such persons are false and destructive. Some psychiatrists have argued, as they do in this case, that increased recognition of the rights of mental patients may result in patients being harmed. Courts have rejected that argument, and experience has shown it to be wrong. The experience, following Baxstrom v. Herold, supra, when the Supreme Court decision resulted in the release from criminal custody of nearly 1000 persons in New York whom psychiatrists had said were dangerous, showed, as have many other studies, that "mental patients" are less dangerous to themselves and others than is the general population. Furthermore, all of the available studies conclude that psychiatrists cannot predict dangerous behavior, either suicidal or homicidal. For a comprehensive review of the literature supporting those conclusions, see Ennis and Litwak, "Psychiatry and the Presumption of Expertise," 62 California Law Review 693 (1974). See also B. SectionII, infra.

This action does not involve the rights of persons currently under treatment for mental illness. Janet Gotkin and the class she represents are former patients, now presumed, by law, to be competent. See A.2. (Section I) infra. And this complaint does not demand that former patients must always be permitted to see their records. The relief requested would allow a disinterested magistrate to deny that right if, after full due process safeguards attach, the hospital can establish good cause why the records should not be made available to the former patient. This case does not in any way affect the doctor-patient privilege of confidentiality. The only records that would be released to Janet Gotkin are Janet Gotkin's records. Finally, Janet Gotkin does not ask this Court to fully and finally decide the many issues of law and fact discussed herein. All she urges is that in light of the very important interests raised by this case, a final decision based on the skimpy and incomplete fact record before this Court is inappropriate, and that this case should therefore be remanded for the development of a complete factual record. As this Court has said, "A case brought under the Civil Rights Act should not be dismissed at the pleadings stage unless it appears 'to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.' Barnes v. Merritt, 376 F.2d 8, 11 (5th Cir. 1967)." Holmes v. New York City Housing, supra, (emphasis added).

Argument

I. SUMMARY JUDGMENT WAS NOT APPROPRIATE SINCE THE HOSPITALS WERE NOT ENTITLED TO JUDGMENT AS A MATTER OF LAW.

Under Rule 56(c), summary judgment may be granted only if "there is no genuine issue as to any material fact and . . .the moving party is entitled to judgment as a matter of law." (emphasis added.)

Appellants (plaintiffs) believe there are geniune issues as to material facts. See Section II, infra. However, the District Court held that "Even if this Court resolved the purported issues of fact in the plaintiffs' favor, they still would not be entitled to relief." Appendix, p. A-96. Appellants (plaintiffs) will show that the District Court in fact resolved the purported issues of fact in the doctors' favor and relied on that resolution in its legal conclusions. See Section II, infra. However, even ignoring the factual disputes, the doctors were not entitled to judgment as a matter of law since the Constitution gives Janet Gotkin a right of access to her records.

A. The Hospitals' Refusal to Give Janet Gotkin Access To Her Records Deprives Her Of Property and Liberty Without Due Process of Law.

1. Janet Gotkin has a property right of access to her own records.

Since Lynch v. Household Finance Corp., 405 U.S. 538 (1972), it is clear that suits under §1983 can be maintained for violations of property rights: "That rights in property are basic civil rights has long been recognized" (405 U.S. at 552).

The District Court held that "The establishment of any property interest is substantially the result of state, rather than constitutional, law." Appendix, p. A-84. That holding is incorrect. The definition of "property" as used in the federal constitution is, and must be, a federal question.* For convenience, because there is not an extensive federal common law of property, in resolving that federal question the federal courts will look for guidance to state law and will, in addition, look to sources other than state law. Thus, the Supreme Court has ruled that "the meaning of 'property'" as used in the Fifth Amendment, is "a federal question."**

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* If this were not so, a state legislature could declare that citizens of that state have no property interest in their houses, automobiles and personal papers. Those items could therefore be searched or seized without probable cause or due process--clearly a result not intended by the drafters of the Fourteenth Amendment.

** United States v. Causby, 328 U.S. 256, 266 (1946); United States ex rel. Tennessee Valley Authority v. Powelson, 319 U.S. 266,279 (1943).

The resolution of that federal question will "normally" but not exclusively gain "content by reference to local law."* Similarly, the meaning of property, as used in the Fourteenth Amendment, is also a federal question. Again, the resolution of that federal question will ordinarily be determined by reference to "existing rules or understandings that stem from an independent source such as state law--rules or understandings that serve certain benefits and that support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The important point here is that state law is not determinative. In Roth, for example, state statutory law did not establish a property right, but the Court looked further to determine if a property right had or had not been "created and defined" by the contractual terms of the plaintiff's employment (408 U.S. at 578). For other cases looking to sources other than state law, see Fuentes v. Shevin, 407 U.S.67 (1972) (contract); Goldberg v. Kelly, 397 U.S.254 (1970) (Federal Law); and Lipman v. Commonwealth of Massachusetts, 475 F.2d 565 (1st Cir., 1973) (custom).

The court below therefore erred in applying a state matter rather than a federal test, and erred in applying that test in looking only to state law, without regard to other sources. The decision below should be reversed for those

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*United States v. Causby, supra; United States ex rel. Tennessee Valley Authority v. Powelson, supra.

reasons alone. Actually, however, it is not necessary for this Court to reverse on those grounds because, as we will show, the court below misinterpreted state law and erroneously concluded that state law does not give former patients a property interest in their records.

First, it is clear that access to property is "property" within the meaning of the due process clause. "It is equally clear that the term 'property' is to be broadly interpreted...(it includes) 'the right to possess, use, and dispose of it...The constitutional provision is adadressed to every sort of interest the citizen may possess.' United States v. General Motors Corp.,323 U.S. 373, 377-378 (1945)." United States v. Certain Land, 220 F.Supp. 696, 699 (D.Me., 1963). Pape v. New York and H.R. Co., 74 App. Div. 175, 77 N.Y.S. 725 (1st Dept., 1902). See also In re Transatlantic and Pacific Corp., 216 F.Supp. 546 (S.D.N.Y., 1963).

In Sosa v. Lincoln Hospital, 190 Misc. 448, 74 N.Y.S. 2d 184 (Sup.Ct., 1947), a former hospital patient sought access to her records. The court held that since she showed a "legitimate and reasonable purpose" (74 N.Y.S. 2d at 185), she would be granted access. That holding was affirmed by the Appellate Division, 273 App. Div. 852, 77 N.Y.S.2d 138 (1st Dept., 1948). The court below distinguished Sosa by saying that it was one of a line of cases holding that former patients are entitled to access to their records

"only when they are necessary for purposes of litigation." Appendix, p. A-94. (emphasis in original). But the court in Sosa said explicitly, "The city contends that the applicants intend to use the inspection as a basis of a suit against the city. That does not appear in the moving papers." (74 N.Y.S.2d at 186). In short, the Sosa court explicitly said it was not granting access for the purpose of litigation. Indeed, New York courts have recognized that there is a "common law right of a patient to inspect his own hospital records." Van Allen v. McCleary, 211 N.Y.S.2d 501 (Sup.Ct., Nassau, 1961).

The court below relied heavily on the case of In re Culbertson's Will, 57 Misc.2d 391,292 N.Y.S.2d 806 (Surr. Ct., Erie Co., 1968) for the proposition that former patients are not entitled to direct access to their own records (though it did hold they had a property interest sufficient to prevent Dr. Culbertson's executor from destroying the records pursuant to the provisions of the will and sufficient to gain indirect access through their own new doctors). Since the decisions of the Sosa case are from courts of general (Supreme Court) and appellate (Appellate Division) jurisdiction, those holdings are more determinative of state law than the holding of a court of limited and inferior jurisdiction (Surrogate's Court).

Moreover, there are other New York cases which acknowledge the right of former patients of access to their own records. In some of those cases, access was granted after the patient had already commenced a personal injury or malpractice action against the hospital. See e.g., In re Greenberg's Estate, 196 Misc. 809, 89 N.Y.S.2d 807 (Sup. Ct., 1949); Glazer v. Department of Hospitals of City of New York, 155 N.Y.S.2d 414 (Sup. Ct., King's Co., 1956); and Thomas v. State, 94 N.Y.S.2d 770, 197 Misc. 288 (Ct. Cl., 1950). Even in Glazer access was granted in an Article 78 proceeding, not as part of the negligence action. Furthermore, in most of those cases, no suit had been commenced. Plaintiffs were seeking access in order to decide whether to sue or not. See, e.g., Hoyt v. Cornwall Hospital, 169 Misc. 361, 6 N.Y.S.2d 1014 (Sup. Ct., 1938); Application of Weiss, 208 Misc. 1010, 147 N.Y.S.2d 455 (Sup.Ct., 1955) (Motion for access granted despite binding precedent against pre-filing discovery); Application of Warrington, 105 N.Y.S.2d 925 (Ct.Cl., 1950) aff., 303 N.Y. 129 (1951); and Montgomery v. State, 69 Misc.2d 127, 328 N.Y.S.2d 189, aff., 43 App. Div.2d 552, 349 N.Y.S.2d 719, app. dism., 33 N.Y.2d 1008, 353 N.Y.S.2d 967, 309 N.E.2d 429(1972).*

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*In the last two cases, the motion was granted by the Court of Claims despite the fact that Court of Claims is a court of limited jurisdiction which has equitable powers only if ex-
(footnote continued on next page)

Surely the talismanic phrase "I might want to sue" does not establish a more cogent reason for granting access than is furnished by the circumstances of this case. In short, New York courts have granted access whenever the former patient has a legitimate reason for wanting to inspect his or her records.

In addition, New York courts have not been reluctant to acknowledge the right of persons to gain access to records about themselves, even where such records are "confidential." In Application of Senitha, 252 App. Div. 304, 299 N.Y.S. 407, aff., 284 N.Y.726, 31 N.E.2d 200 (1940), the court held that an attorney's client has a right to the records which the attorney has concerning the client. In Van Allen v. McCleary, supra, students over 18 were given access to all of their school records, including psychological and psychiatric records. An argument can be made that some students are disturbed and access to their psychological and

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(continued from previous page)
pressly granted or incident to enforcement of a damage award. Montgomery v. State, supra. Since this motion was not granted incident to a damage award it must have been granted pursuant to §9 of the Court of Claims Act which says "This court shall have jurisdiction...2. To hear and determine a claim of any person...against the state for the appropriation of any... property or any interest therein." In other words, in order to have had jurisdiction, the court must have held that former patients had a property interest in access to their own records.

psychiatric records might be harmful. However, the Van Allen court made no exceptions. Though no statute existed to give students that right, the court relied on a decision by the Commissioner of Education and the common law to find a property right to access to those records for all students, explicitly rejecting arguments advanced by amicus which were identical to the arguments made by the hospitals herein.* See also, to the same effect, Matter of Thibadeau, No. 6849, Comm. of Ed., Sept. 22, 1960 and Board of Education of City of New York., Special Circular No. 103, 1972-1973.** In People ex rel Robin v. Hayes, 84 Misc. 263, 147 N.Y.S. 102 (Sup.Ct., N.Y., 1914), the court acknowledged the right of an ex-prisoner to see his prison records. Finally, in Bearor v. Kapple, 24 N.Y.S.2d 655 (Sup.Ct., Schoharie Co., 1940), the court held that an accident victim was entitled to see a copy of the statement he gave to the defendant's insurance company, not a party to the suit. The court said that denying the plaintiff a copy "shocks the conscience and belittles intelligence and reason" (24 N.Y.S.2d at 658). "Common courtesy, if not law, would demand and require that a copy of the statement taken should have been left with the plaintiff." (24 N.Y.S. 2d at 659).

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* While Van Allen dealt explicitly with parents of students, the court, relying on the decision by the Commissioner, made it clear that adult students have the same rights.

** This rule has now been made a federal law. P.L. 93-380, §438(a)(1) and §438(e).

Other jurisdictions also recognize the rights of former patients of access to their records. In Pyramid Life Ins. Co. v. Masonic Hospital, 191 F.Supp. 51 (W.D. Okla., 1961), the court held that "The patient has a property right in the information appearing or portrayed on the records and he...is entitled to make such inspection and/or to copy such records without resort to litigation." (191 F.Supp. at 54). Likewise in Wallace v. University Hospitals of Cleveland, 164 N.E.2d 917 (Ct. Common Pleas, Ohio, 1959), the court said, "a patient has a property right in the information contained in the record and as such is entitled to a copy of it." (164 N.E. 2d at 918). See also Abelsons Inc. v. New Jersey State Board of Optometrists, 65 A.2d 644 (Sup. Ct., N.J., 1949); Bishop Clarkson Memorial Hospital v. Reserve Life Ins. Co., 350 F.2d 1006 (8th Cir., 1965) (The patient has a "proprietary interest in his own record." 350 F.2d at 1012)*

Finally, the court below relied heavily on §15.13 of the Mental Hygiene Law of New York to find that former patients do not have a property right of access to their own

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* See also Report X, Adopted by the American Medical Association's House of Delegates, June, 1972 ("The patient has a recognized right to information from the records"); American Hospital Association Draft of Model Legislation on the Release of Medical Record Information, 9/10/74, "It is therefore recommended: 1. That statutes be enacted in all states recognizing the patients' right to access to the information contained in his medical records."

records.* Appendix,pp. A-86-A-87. That section, quoted in full by the court below, neither expressly acknowledges nor expressly denies former patients the right of access to their own records. It is silent on that point. In fact, plaintiffs submitted an uncontradicted affidavit by one of the persons who participated in the drafting of that section that it was not the intention of the drafters to either acknowledge or deny former patients access to their own records. Appendix, pp. A-32 - A-33. §15.13 is part of Article 15. Article 15 is entitled, "Rights of Patients." 1 McKinney's Statutes §13 provides that "The title of an act defines the scope of the enactment and gives notice of the purpose which its sponsors had in mind."

Moreover, to interpret §15.13 as denying that right, as the District Court did, is to interpret the section restrictively, denying patients' rights. Yet, the entire thrust of the Mental Hygiene Law is to increase patients' rights. 1 McKinney's Statutes §92 provides that "The primary consideration of the courts in the construction of statutes is to ascertain

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*The District Court also relied on the regulations and policy of the New York Department of Mental Hygiene. The nature of the DMH policy is a factual dispute in this case. See Section II, infra. Moreover, this case presents a constitutional challenge to the DMH policy. Surely, it makes no sense whatsoever to hold that the policy defines its own constitutionality.

and give effect to the intention of the legislature." The Memorandum of the Joint Legislative Committee on Mental and Physical Handicap says, with regard to Article 15, "It... broadens patients' rights in many respects." McKinney's 1972 Session Laws of New York, Volume 2, p. 3282. Governor Nelson Rockefeller signed the bill saying "Of particular significance are the provisions with respect to the rights of patients..." and referred to "the progressive thinking reflected in this bill." Id., p.3386. 1 McKinney's Statute §92 provides that "A basic consideration in the interpretation of a statute is the general spirit and purpose underlying its enactment, and that construction is to be preferred which furthers the object, spirit and purpose of the statute."

A comparison of the new Mental Hygiene Law with the old, makes this point even clearer.* Section 34(16) of the old

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* The definition of property, even in a constitutional sense, can change over time. (Property is "among the '[g]reat [constitutional] concepts...purposely left to gather meaning from experience...'" Board of Regents v. Roth, supra, 408 U.S. at 571, quoting from National Ins. Co. v. Tidewater Co., 337 U.S. 582, 646, (1949)(Frankfurter, J., dissenting). United States v. Causby, supra,(holding that for constitutional purposes, the common law definition of property "has no place in the modern world."), People ex rel Brixton Operation Corp. v. Lafetra, 185 N.Y.S. 632, 113 Misc. 527, 635 (Sup.Ct., N.Y., 1920) ("The meaning of the words...property are not and cannot be fixed and unchanging.")

law provided that "a complete clinical record...[shall be made] of each patient" (emphasis added). The new law provides that "A clinical record for each patient shall be maintained." §15.13(a). The new statute gives the patient a veto power over distribution of the record to third parties. §15.13(c)(4). See infra, p.25 . The old law did not. §20. The old law gave the Commissioner of the Department of Mental Hygiene access to all patient records. §34(9). The new Mental Hygiene Law does not. §§15.13, 31.11. This last point is very important. Because §15.13 does not explicitly give the former patient access to his or her records, the court below said the former patient was not so entitled. But the court below did not similarly restrict the right of the defendant Commissioner of access to all records, including Janet Gotkin's records, despite the fact that §15.13 does not explicitly give the Commissioner access to those records, either.* If §15.13 is to be read to deny the right of access to former patients, it must also be read to deny the right of access to the Commissioner.

There is a common law right of patients of access to their hospital records. See supra, p.15 . "Rules of the common law are to be no further abrogated than the clear import of the language used in the statute absolutely requires,"

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*In fact, the Commissioner has vigorously asserted that right in other actions. Volkman et al. v. Miller et al., Index No. 01209 (Sup.Ct., N.Y. Co., filed 1974).

Transit Commission v. Long Island R. Co., 253 N.Y. 345, 555 (1930) and if the exact meaning of the statute is "doubtful," the common law construction must be followed. People v. Dethloff, 283 N.Y. 309 (1940). See also In re Wilson Sullivan Co., Inc., 289 N.Y. 110, 115 (1942); People v. Trowbridge, 305 N.Y. 471, 476 (1953); and Parker v. Hoefer, 2 N.Y.2d 612, 615, 162 N.Y.S.2d 13,15 (1957) cert. den. 355 U.S. 833.

The thrust of the new Mental Hygiene Law is exactly the same thrust as case law, both in other jurisdictions (see Introduction, supra) and in New York, toward an expanded recognition of the rights of patients and former patients. See e.g., Kesselbrenner v. Anonymous, supra.

Finally, to construe §15.13 as denying former patients access to their records as the court below did, would raise serious constitutional problems. See A.2 and C. infra, (Section I). 1 McKinney's Statutes §150(c) provides that "A statute should be construed, if possible, to uphold its constitutionality." Appellants have not challenged the constitutionality of §15.13. However, if that statute is construed so as to deny former mental patients their constitutional right of access to their records, the appellants would then be compelled to challenge its constitutionality. The District Court did so construe the statute. Similarly, if the constitutionality

of §15.13 is to be deemed at issue, the District Court exceeded its jurisdiction since a challenge to the constitutionality of state statute seeking injunctive relief can only be entertained by a three-judge District Court (28 U.S.C. §2281), and a single judge lacks authority to grant summary judgment to either side. Ex Parte Northern Pac. Ry, 280 U.S.142 (1929); Ex Parte Poresky, 290 U.S.30 (1933); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S.713(1962); Kramer v. Union Free School District No. 15, 379 F.2d 491 (2nd Cir., 1967).

In short, under all of the rules of logic and construction, §15.13 cannot be construed to deny former patients access to their hospital records. And, it is clear under New York case law that former patients do have the property right of access to their own hospital records.

Furthermore, this interpretation of New York law, acknowledging the right of former patients of access to their own records, is consistent with the generally accepted concepts of property, in federal and New York case law.

Janet Gotkin clearly has a property interest in her hospital records. Indeed, it can be fairly described as an ownership interest. The records are not the sole property of the hospital. Janet Gotkin is a part owner.

Section 15.13(c)(4) gives Janet Gotkin and the Commissioner of the Department of Mental Hygiene each veto power over the distribution of her records to most third parties. CPLR §4504(a) gives Janet Gotkin, and not the Commissioner, veto power over disclosure of any of the information in her records. This section has been invoked in a wide variety of circumstances to prevent disclosure of patient information. See, e.g., New York City Council v. Goldwater, et al., 284 U.S. 296, 31 N.E.2d 31 (1940); Munzer v. State, 41 N.Y.S.2d 98 (Ct.Cl., 1943). And it is clear the privilege belongs to the former patient, not to the doctor. See, e.g., In re Warrington, 303 N.Y. 129 (1951); Westphal v. State, 79 N.Y.S.2d 634 (Ct.Cl., 1948); Ehrlich v. Gerstenhaber, 138 N.Y.S.2d 702 (Sup.Ct., Kings Co., 1955).* Finally, a recent amendment to the Public Health Law provides that, upon a patient's request, the doctor or hospital must give the records concerning that patient to any other

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*In a somewnat confused and unreported decision, the New York Supreme Court in Doe v. Roe held that a patient had the right to stop a doctor from publishing a book about her treatment apparently even though it found that the attempts taken to disguise her identity "reasonably met the usual standards for such disguising." See Doe v. Roe, 345 N.Y.S.2d 560, 42 App.Div.2d 559 (1st Dept., 1973) aff. 33 N.Y.2d 902, 352 N.Y.S.2d 626 (1973), cert. granted May 28, 1974 (No.73-1446). Since the patient's privacy would be protected by the disguise, it would seem that the court implicitly recognized a property interest of the patient in the content of the records beyond the usual privacy and confidentiality grounds for withholding access to third parties. Moreover, if the patient's property interest is sufficient to prevent such distribution despite the strong doctrine against prior restraint of publications, it is certainly strong enough to give her access to her own records.

designated doctor or hospital, even if they believe it would not be in the best interest of the patient to follow the patient's instruction. Public Health Law §17 (44 McKinney's Statutes §17). In short, New York law gives Janet Gotkin more control over access to her hospital records that it does to the hospital, the doctor, or the Commissioner.*

"[T]he traditional test of ownership is the power to exclude others...See Corliss v. Bowers, 281 U.S.376, 74 L.Ed.916, Griffiths v. Helvering, Comm, 308 U.S.355, 84 L.Ed. 319." Dairy Queen of Oklahoma v. Comm. of Int. Rev., 250 F.2d 503 (10th Cir., 1957). See also United States v. Lutz, 295 F.2d 736, 740 (5th Cir., 1961) ("The owner has the right... to exclude others from the use of it."); Rohmer v. Comm. of Int.Rev., 153 F.2d 61, 63, n.9. (2nd Cir., 1946) ("it is of the essence of 'property' generally that is owner has the right, enforceable by court action, to exclude others from its use."); Standard Brands v. Smidler, 151 F.2d 34, 39, n.7 (2nd Cir., 1945)(Franck, C.J., concurring) ("An owner of property thus has...the power to exclude others.") If these records were subject to taxation, Janet Gotkin would be taxed, not the hospital. Dairy Queen of Oklahoma v. Comm.of Int. Rev., supra. If it were illegal to possess these records,

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* See also N.Y.C.R.R., Title 8 §60.1(d).

Janet Gotkin could go to jail with the doctors. Hernandez v. United States, 300 F.2d 114 (2nd Cir., 1962); United States v. Jones, 308 F.2d 26 (2nd Cir., 1962); See also, United States v. Wolfenbarger, 426 F.2d 992 (6th Cir., 1970); Amaya v. United States, 373 F.2d 197 (10th Cir., 1967); Arellanes v. United States, 302 F.2d 603 (9th Cir., 1962)("possession... [is] dominion and control so as to give power of disposal... Such possession can thus be constructive and need not be exclusive, but may be joint." 302 F.2d at 606).

If, then, Janet Gotkin is one of the owners of these records, she is entitled to access to them. "It is elementary that it [ownership] includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property." Buchanan v. Warley, 245 U.S. 60 (1917). See also, Washington ex rel Seattle Title Trust Co. v Roberge, 278 U.S. 116 (1928); Duvall v. 20th Century Coal Co., 104 F.Supp.725 (W.D.Ken., 1952); Kristel v. Steinberg, 188 Misc.500, 69 N.Y.S.2d 476 (Mun.Ct., N.Y., 1947); Ganbaum v. Rockwood Realty Corp., 188 Misc.500, 308 N.Y.S. 2d 436 (Sup.Ct., Bronx, 1970); Johnson v. Colter, 251 App.Div. 697,297 N.Y.S. 345 (4th Dept., 1937) ("An owner is ordinarily possessed of the right to the free and unrestricted use and enjoyment of his property; that right will not be curtailed

unless such intent is clearly made to appear." 297 N.Y.S. at 348).

It is true that some of the incidents of ownership may be split off from other incidents. However, "Under common law and statutes...The entire bundle passes" generally. United States v. Lutz, supra. See also Hunter v. United States, 388 F.2d 148 (9th Cir., 1967). In addition, splitting off some incidents is disfavored by the law. Los Angeles University v. Swarth, 107 F. 798 (9th Cir., 1901); United States v. Finn, 127 F.Supp. 158 (S.D. Cal., 1954)("restrictions upon title which restrain alienation and use are not favored by law." 127 F.Supp. at 163). Premium Point Park Association v. Polar Bar, 306 N.Y. 507, 119 N.E.2d 360 (1954) ("The law favors the free and unobstructed use of property." 306 N.Y. at 512); Etkin v. Hyney, 32 App.Div.2d 704, 299 N.Y.S. 2d 862 (3rd Dept., 1969). In other words, the favored legal interpretation would be that since Janet Gotkin has an ownership right in the records, she must have all of the incidents of such ownership, including access, unless those incidents are explicitly taken away.* And the due process clause attaches to a deprivation

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*Once the state has vested some degree of property right in a person, it is limited in the amount to which it can abridge the traditional incidences of property rights by the due process clause. Arnett v. Kennedy, ___U.S.___, 40 L.Ed.2d 15,66 (Marshall, J., dissenting notes that a majority of the Court rejects the contrary argument made by Mr. Justice Rehnquist.)

of those incidences even though she is not the sole owner of the records and even if her claim to ownership is in doubt. Fuentes v. Shevin, supra; McClendon v. Rosetti, 460 F.2d 111 (2nd Cir., 1972).

In short, whether the analysis is direct (the patient's right of access to his or her own records), or indirect (examination of the general rules regarding property and property rights), it is clear that under New York State law, former mental patients do have a property right of access to their own hospital records.

Of course, once it is determined that Janet Gotkin has a property right of access to her records and that, therefore, the due process clause attaches, the inquiry is not over. The due process clause does not protect totally against deprivation of property rights, but only provides that such rights shall not be taken without due process. The question of what procedural mechanisms should be established to control situations where the state wishes to deprive a person of his or her property rights can only be answered after the interests of the hospital and the interests of the former patient are balanced.*

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*There is some indication in the cases that the court should balance the interests as an aid to determining whether or not the former patient does have a property right in his or her own records. See, e.g., Palmigiano v. Baxter 487 F.2d 1280 (1st Cir., 1973); People v. Miller, 304 N.Y. 105 106 N.E.2d 34 (1952).

Appellants believe that after that balancing is performed, the Court should hold that all former patients are entitled to access to their records unless the hospital can demonstrate to a disinterested magistrate that there is good cause not to grant access. However, appellants respectfully suggest that such a balancing cannot be performed in a vacuum and should await full development of the factual record in this case, particularly since the strengths of the various interests are vigorously disputed by the parties.

2. Janet Gotkin has been deprived of her right to liberty without due process by the refusal of the hospitals to grant her access to her hospital records.

In Wisconsin v. Constantineau, 400 U.S. 433 (1971), the Supreme Court held that a person's reputation was part of the liberty which may not be abridged without due process:

> "Yet certainly where the State attaches 'a badge of infamy' to the citizen, due process comes into play. . .where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."
> 400 U.S. at 437.

See also, Wieman v. Updegraft, 344 U.S. 183 (1952); Stewart v. Pearce, 484 F.2d 1031 (9th Cir. 1973). This holding was

reiterated in Board of Regents v. Roth, supra, where the Court said that liberty included "damages to standing and associations in his community." The Court in Roth also held that liberty included the foreclosure of an opportunity to take advantage of other employment opportunities, 408 U.S. at 573, citing (among others) Truax v. Raich, 239 U.S. 33 (1915), Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

In this case, the hospitals have stigmatized Janet Gotkin by labeling her mentally unfit to review her records. They have asserted, as a principal reason for denying her access to her records, that "the revelation of some information in a former patient's record could be detrimental to that individual's current well being," Appendix p.A-21. Janet Gotkin is no longer receiving therapy. She has not been for some time. She leads a normal, stable life with normal pressures. Under New York Law, she is clearly presumed sane and competent. See, e.g., In re Jacob's Estate, 2 App.Div. 2d 774, 154 N.Y.S.2d 536 (2nd Dept., 1956), aff., 3 N.Y. 2d 723, 143 N.E.2d 514, 163 N.Y.S.2d 965 (1957); Jones v. Jones,137 N.Y.610,33 N.E.479 (1893). That is true even for someone who has been hospitalized for mental illness. Danna v. State, 207 Misc.505, 139 N.Y.S.2d 585 (Ct.Cl., 1955); McCracken v. R. and B. Lunch Co., 281 App.Div. 215, 119 N.Y.S.2d 827 (3rd Dept, 1953); Mental Hygiene Law §15.01. But the hospitals suggest that Janet Gotkin will have a nervous breakdown if she sees

her records. Besides having no support in the record, such a claim assumes that anyone who has been treated for mental illness remains sick, or at least so close to being sick that the slightest push will topple that person into insanity. In Stewart v. Pearce, supra, the school ordered a teacher to submit to a psychiatric interview. The Court held that that order "implied that there existed both reasonable grounds for the order and mental unfitness for the job." 484 F.2d at 1034. Recognizing the stigma which attaches to mental illness, the Court refused to allow such an order without a hearing pursuant to the due process clause. See also, Axtell v. Kelly, 185 N.Y.S.2d 974, 17 Misc.2d 222 (Sup.Ct., 1959). Likewise, the refusal to give Janet Gotkin her records assumes and implies there are reasonable grounds to believe she is mentally unfit to review her records. In Lombard v. Board of Education, supra, this Court explicitly held that the label of mental illness was stigmatizing and that it was unconstitutional to apply that label to a person without due process:

> "A charge of mental illness, purportedly supported by a finding of an administrative body, is a heavy burden for a young person to carry through life. A serious constitutional question arises if he has had no opportunity to meet the charge by confrontation in an adversary proceeding." Slip opinion, p. 14.

There is no other place Janet Gotkin can go to obtain her records. Unlike Roth, and Lombard, who could get teaching jobs elsewhere, Janet Gotkin cannot get her records elsewhere. The hospitals have foreclosed that possibility. In short, the restriction imposed by the hospitals in this case is more severe than the restrictions imposed in Roth and Lombard.

B. The Hospitals' Refusal To Give Janet Gotkin Access To Her Records Constitutes An Unreasonable Seizure In Violation Of The Fourth Amendment.

The hospitals have custody of papers in which Janet Gotkin and the class she represents have an interest and indeed are part owners. See A,1, Section I, supra. In denying Janet Gotkin access to those papers, the hospitals have unreasonably seized Janet Gotkin's property in violation of the Fourth Amendment.

The Fourth Amendment says:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Janet Gotkin is part owner of these records. At least, she has a property right of access to the records. See A,1, Section I, supra. In Katz v. United States, 389 U.S. 347 (1967), the Supreme Court rejected the view that the Fourth Amendment only protected tangible items. The Court held that interception of conversations, even without physical intrusion into a given enclosure, was governed by the Fourth Amendment.

The District Court denied the Fourth Amendment claim on essentially two grounds. First, "the application of the Fourth Amendment in a civil context has usually been

confined to replevin actions . . ." Appendix, p. A-82. This is not a replevin case since "possession and ownership of the medical records has always remained with the hospitals," Appendix, p.A-83. But the civil application of the Fourth Amendment is not confined to replevin actions. See, e.g., Camara v. Municipal Court, 387 U.S. 523 (1967); United States v. Undetermined Quantities of Depressant or Stimulant Drugs, 282 F.Supp. 543 (Fla. 1968). Furthermore, Janet Gotkin does have an ownership interest in these records.

Second, the District Court said that "even assuming arguendo that the hospitals' retention of their own records is to be construed as a 'seizure', it cannot seriously be argued that it was an unreasonable one." Appendix, p. A-83. First, it should be noted that, because both the hospitals and Mrs. Gotkin have ownership interests in the records, she seeks only a copy, not to deprive the hospital of its only copy. In addition, appellants expect to prove that indeed, the seizure was unreasonable. See B, Section II, infra.

C. The Hospitals' Refusal To Give Janet Gotkin Access To Her Own Hospital Records Violates Her Constitutional Right To Autonomy.

At common law, the courts have always recognized the right of the individual to make decisions about his or her own life. That right has usually arisen in the context of proposed medical treatment. In 1914, Justice Cardozo wrote that "Every human being of adult years and sound mind has a right to determine what shall be done with his own

body; and a surgeon who performs an operation, without his patient's consent, commits an assault." Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92 (1914). Out of this principle developed the rule that a doctor must explain to a patient the nature and consequences of proposed treatment, so that the patient can decide what to do. In short, the doctor has a duty to disclose such information to his or her patient.

Initially, the scope of duty to disclose was defined by the judgment of the medical profession as to what should be disclosed to the patient, and great deference was paid to the doctor's expert evaluation. See, e.g., DiFilippo v. Preston, 53 Del. 539 (3 Storey 539), 173 A.2d 333 (Del. S.C. 1961); Aiken v. Clary, 396 S.W.2d 668 (Mo. S.C. 1965). More recently, however, the unmistakable trend is represented in cases such as Canterbury v. Spence, 464 F.2d 772, 786-7 (D.C. Cir. 1972), where the Court said:

> "In our view, the patient's right of self-decision shapes the boundaries of the duty to reveal. That right can be effectively exercised only if the patient possesses enough information to enable an intelligent choice. The scope of the physicians' communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision. That the test for determining whether a particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked. And to safeguard the patient's interest in achieving his own determination on treatment, the law must itself set the standard for adequate disclosure."

See also, Fogal v. Genesee Hospital, 344 N.Y.S. 2d 552 (App. Div. 4th Dep't., 1973); Wilkenson v. Vesey, 295 A.2d 676 (R.I. 1972); Berkey v. Anderson, 1 Cal. App.3d 790, 82 Cal. Reptr. 67 (Ca. 1970); Resnik, Judith, "Patients' Rights," Annual Survey of American Law, New York University School of Law, Fall, 1973, p. 87; 2 Harper and James, The Law of Torts (1968 Supp.). These cases and authorities emphasize the rule expressed by Judge Cardozo that it is "every competent adult's right to forego treatment, or even cure, if it entails what for him are intolerable consequences or risks however unwise his sense of values may be in the eyes of the medical profession, or even the community." Wilkenson v. Vesey, supra, 295 A.2d at 687. The newer cases require that the doctor disclose to the patient all of the information which the patient needs in order to intelligently decide. Any they make it clear that the scope of the disclosure, based on the patient's need to know, is a legal question, not a medical question. See Canterbury v. Spence, supra.*

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*These cases recognize a "carefully circumscribed" exception to the general rule of disclosure where disclosure would so upset a patient who is currently in need of treatment that the patient would refuse such treatment. Canterbury v. Spence, 464 F.2d at 739. That is vastly different, however, from defendants' policy of assuming disclosure will cause harm and refusing access to former patients who are presumed competent and who are not currently in need of treatment.

(Footnote continued on next page)

In recent years, this right of autonomy over one's life and body has received recognition as a constitutional right in a series of cases usually referred to, sometimes inaccurately, as "privacy" cases.

The right to privacy can be traced as far back as Meyer v. Nebraska, 262 U.S. 390 (1923), where the Court held that "liberty" of the Fourteenth Amendment included more than "freedom from bodily restraint, but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge . . . and, generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. . ." (262 U.S. at 399-400) (emphasis added). Meyer was cited approvingly in the leading case of Griswold v. Connecticut, 381 U.S. 479 (1965), which held that the state could not invade the right of privacy of the individual by prohibiting the use of contraceptive devices. Subsequent privacy cases have made it clear that the right to "privacy" protects areas of individual autonomy (frequently medical) into which the state may not intrude.

(Footnote continued from previous page)

In addition, the exception does not permit total non-disclosure, but suggests that disclosure must be made to the patient's closest relative, here plaintiff Paul Gotkin. (And thus if the Court were to recognize Janet Gotkin's right to the information in her records, Paul Gotkin's standing in this action is obvious.) See Appendix, p. A-78.

Finally, the scope of the exception is to be determined by law, not by the doctor. See, e.g., Canterbury v. Spence, supra.

See, e.g. Roe v. Wade, 410 U.S. 113 (1973). ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.")

Those cases, both in language and in logic, are really protecting not "privacy," as that word is commonly understood, but "autonomy." In Griswold, the State did not seek to publicize or expose all people using contraceptives. In Roe, the State did not seek to expose all women having abortions. Instead, they attempted to make use of contraceptives and abortions illegal. Any violation of the "privacy" of the persons was incidental to the use of the criminal law to interfere with the autonomy of those persons over their lives and bodies.

This Court has explicitly recognized that some of the privacy cases are really autonomy cases. Surely restrictions on long hair cannot be considered violations of "privacy," since the length of a person's hair is easily visible to all. Yet, in Dwen v. Barry, 483 F.2d 1126 (2nd Cir. 1973), this Court reversed a District Court which had granted summary judgment against a police officer who challenged restrictions on his hair length. This Court said "Personal liberty is not composed simply and only of freedoms held to be fundamental but includes the freedom to make and act on less significant personal decisions without arbitrary governmental interference." (483 F.2d at 1130). See also Canterbury v. Spence, supra at 486, ("The

patient's right of self-decision" shapes the duty to disclose.)

In short, the Constitutional right to autonomy (privacy) is identical to the common law right to autonomy (privacy). And just as the courts in the latter area have recognized that such a right is meaningless unless the individual is given the necessary information to make decisions, so this Court should recognize that such information is essential to a meaningful exercise of the constitutional right.

Indeed, this Court has already gone even further than that simple and logical proposition by holding that the individual is constitutionally entitled to the means to implement decisions about his or her own life. In McCabe v. Nassau County Medical Center, 453 F.2d 698 (2nd Cir. 1971), for example, Judge Travia had dismissed a complaint challenging the refusal of a hospital to perform a sterilization operation requested by the plaintiff. In reviewing Judge Travia's dismissal, this Court said it was a "massive understatement to say that their (plaintiff's) allegations are not frivolous." (453 F.2d at 704). See to the same effect, Hathaway v. Worcester City Hospital, 475 F.2d 701 (1st Cir. 1973).

As those cases suggest, it is inconsistent with an individual's right to make personal decisions to deny that individual the personal information and the means

necessary to make, and even implement, those decisions. Janet Gotkin and other members of the class are constantly called upon to waive the confidentiality of their records and send copies to employers, insurance companies, schools, welfare workers, etc.* Such requests are made because of the unfortunate and mistaken belief by such persons (a belief fostered by the doctors and hospitals herein) that anyone who has ever received services for an emotional problem is forever in serious danger of a relapse. That belief is simply not true and appellants expect to prove its falsity if this case is remanded for the development of a factual record. But Janet Gotkin and other members of the class cannot intelligently consent to giving third parties access to their records without knowing the content of those records, just as the persons about whom Justice Cardozo spoke could not intelligently consent to medical treatment without knowing the facts concerning such treatment.**

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*In the specific facts of this case, Janet Gotkin's most urgent need for her records is based on her need to write an accurate and comprehensive book about her experiences as a patient.

**The District Court's rejection of this claim was clearly based on a view of the right to "privacy" in the usual sense of that word. See Appendix, pp. A-83 - A-84. It does not, therefore, address itself at all to the issues raised herein.

II. SUMMARY JUDGMENT WAS NOT APPROPRIATE SINCE THERE WERE IN DISPUTE GENUINE ISSUES OF MATERIAL FACTS.

Under Rule 56(c), summary judgment may be granted only if "there is no genuine issue as to any material fact."

Motions for summary judgment are not favored. Almost twenty years ago this Court ruled "that trial judges should exercise great care in granting motions for summary judgment. A litigant has a right to a trial where there is the slightest doubt as to the facts . . ." Doehler Metal Furniture Co. v. United States, 149 F.2d 130, 135 (2nd Cir. 1945). That is still the law. Dolgow v. Anderson, 438 F.2d 825 (2nd Cir. 1971); Drake v. Handman, 30 F.R.D. 394, 396 (S.D.N.Y. 1962). See also, Weiss v. Kay Jewelry Stores, Inc., 470 F.2d 1259, 1262 (D.C. Cir. 1972) ("Once it is determined that material facts are in dispute, 'summary judgment may not be granted', and in 'making this determination doubts . . . are to be resolved against the granting of summary judgment'. To warrant summary judgment the record 'should show the right of the [movant] to a judgment with such clarity as to leave no room for controversy, and . . . should show affirmatively that the [adverse party] would not be entitled to [prevail] under any discernible circumstances . . . A summary judgment is an extreme remedy, and, under the rule, should be awarded only when the truth is quite clear.")

Crystal City v. Del Monte Corp., 463 F.2d 976, 981 (5th Cir. 1972) ("The granting of a motion for summary judgment is the exception rather than the rule . . .") cert. den. 409 U.S. 1023 (1972) United States v. Pan American Mail Line, Inc., 59 F.Supp. 728 (S.D.N.Y. 1972).

In Associated Press v. United States, 326 U.S. 1, 6 (1945), the Supreme Court said "We agree that Rule 56 should be cautiously invoked to the end that parties may always be afforded a trial where there is a bona fide dispute of facts between them." See also, Securities and Exchange Commission v. American Beryllium and Oil Corp., 303 F.Supp. 912, 916 (S.D.N.Y. 1969); American Airlines v. Airline Pilots Association, 91 F.Supp. 629, 632-633 (E.D.N.Y. 1950); Sloane v. Land, 16 F.R.D. 242, 243 (S. D.N.Y. 1954).

Indeed, the District Court acknowledged this line of cases, noting that "The standard for determining whether a Civil Rights complaint should be dismissed is a rather narrow one and the courts have been generally loath to dismiss such an action, unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Appendix, pp. A-78 - A-79.

Despite this strong authority, undisputed by defendants, the District Court granted summary judgment, hold-

ing that "There is no dispute as to the underlying facts of this case and all of the alleged controverted issues of fact conjured up by the plaintiffs are simply not material to the outcome of this case. Thus, this Court finds that there exists here no genuine issue of fact to be tried and that the defendants are entitled to judgment as a matter of law. Even if this Court resolved the purported issues of fact in the plaintiffs' favor, they would still not be entitled to relief." Appendix, p. A-96. Yet, there were very genuine and very material facts at issue. Indeed, the District Court, in its opinion, decided a factual dispute, and decided it in favor of the hospitals' position.

A. The Nature Of The Hospitals' Policies Concerning Access By Former Patients To Their Own Records Is In Dispute.

The District Court held that "Department policy, however, does permit a former patient to designate any licensed physician to receive the records (of the patient) for him." Appendix, p. A-88. Later, it repeated this holding, stating that "It is only necessary to note that such a policy does exist." In finding that such a policy does exist, the District Court apparently relied on the affidavit of Abbott Weinstein of May 10, 1974, Appendix, p. A-20 - A-22. In fact, the District Court quoted at length (without acknowledgement) from that affidavit in

explaining the justification for such a policy. Compare Appendix, pp. A-20 - A-23 with Appendix,A-88 - A-89.

However, appellants, in their Statement Pursuant to Rule 9(g), and supporting affidavits (Appendix, p. A-47) denied the existence of such a policy, maintaining that "plaintiffs can establish, through pre-trial discovery, that the medical screening mechanism now proposed by defendants is a purely ad hoc response to this litigation and not a policy of general applicability." Appendix, p. A-33, ¶6. This point was re-emphasized in the Complaint and in the Memorandum of Law of May 28, 1974, wherein it was said that the policy of the Department was and is that " 'No former patient may ever be allowed access to his or her own hospital record' and that such policies are 'without regard to the individual circumstances of each case' (Complaint, paragraphs 24 and 30)."

In short, this action was brought to test the constitutionality of the state policy of denying all former mental patients access to their hospital records. The hospitals deny that that is their policy, asserting a medical screening mechanism. The District Court decided that factual dispute in favor of the hospitals, the moving parties* and granted the motion for summary judgment.

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*As this Court has held, "The cases hold also, that in ruling on a motion for summary judgment, all doubts as to the existence of a 'genuine issue as to any material fact' must be resolved against the moving party" Empire Electronics v. United States, 311 F.2d 175, 180 (2nd Cir. 1962) (Kaufman, J.)

The District Court clearly believed the existence of such a policy to be material. "It is not material to the issues presented in this case for this Court to pass upon the wisdom of such a policy. It is only necessary to note that such a policy does exist." Appendix, p. A-89. The Court went on to rely on the existence of such a policy to hold that Janet Gotkin had no property interest in her records since a property interest was not recognized by the state policy. See Appendix, p. A-84. ("The establishment of any property interest is substantially the result of state, rather than constitutional law."), ("neither the statutory, administrative nor decisional law of New York recognizes a former patient's entitlement to his medical files . . ." (emphasis added). In short, the District Court found it necessary to resolve this factual dispute in order to decide a crucial question of law. See A,1, Section I, infra. Summary judgment was inappropriate in those circumstances.

Moreover, that issue was not raised lightly and the claim is not a frivolous or wholly insubstantial one. In order to understand the claim, it is necessary to look carefully at the specific facts.

The medical screening policy, which the District Court accepted as fact, is set forth in the Weinstein affidavit, supra. Mr. Weinstein is the Director of Statistics

and Clinical Information Systems for the Department of Mental Hygiene and, in his affidavit, maintains that "he is conversant with the Department of Mental Hygiene policy regarding disclosures of information from patients' medical records." The policy outlined in his affidavit, however, is not the policy found in the Department's official policy manual, see p. 50 infra. According to Mr. Weinstein,

> "Department of Mental Hygiene policy provides that information from the medical record of a former patient of a hospital or other facility operated by the Department of Mental Hygiene may be made available, upon the request of the former patient to any physician designated by the former patient to act on his or her behalf.
>
> * * * * *
>
> The physicians to whom the record has been made available provide an oral interpretation of the record's contents to the former patient and/or former patient's designees. If the physician concludes that the record contains no information which would be harmful to the former patient or which would violate the rights of others to confidentiality, he may arrange to have a copy of the record given to the former patient. If parts of the record would be harmful to the former patient or would violate the rights of others, copies of those parts would not be given to the former patient." Appendix, pp. A-20 - A-22.

The policies of Drs. Rabiner and Lipkowitz are apparently similar, but not identical.*

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*The District Court never referred to any policy of Drs. Rabiner and Lipkowitz, ignoring completely plaintiffs' attack on their policies of non-disclosure. The only fair reading of the opinion is that the policies of Drs. Rabiner and Lipkowitz are identical to those of Drs. Miller and Wallach and dictated by state law and policy.

The only statement of policy of Dr. Rabiner is contained in a letter from Robert C. Brice, Associate Administrator of Long Island Jewish-Hillside Medical Center, dated March 11, 1974, to Janet Gotkin. It provides that:

> ". . . After a specific review of your medical record and in accordance with hospital regulations we do not feel that we will be able to release your record to you without either a subpoena or court order.
>
> * * * * *
>
> This record, however, can be released to your physician if he formally requests it and accompanies the request with an authorization form signed by you and acknowledged before a Notary Public. The information that we would disclose would be confined to that which is pertinent to the specific goals of the physician who requests this information under your authorization." Appendix, p. A-67.

This policy is different from that of Drs. Miller and Wallach since it will only release to the physician information "which is pertinent to the [his] specific goals."

Dr. Lipkowitz has never responded to Janet Gotkin concerning her request to see her own records. However, his policy is set out in his affidavit of May 31, 1974. Appendix, pp. A-45 - A-46.

> "The policy of Gracie Square Hospital with respect to the release of the clinical records of patients is similar to the policy of the Department of Mental Hygiene with respect to its own facilities as enunciated in Section 15.13 of the New York State Mental

> Hygiene Law. There, it is provided that clinical records of patients in Mental Hygiene Department facilities shall not be public records but may be released pursuant to Court order, to the Mental Health Information Service, to attorneys representing patients in involuntary hospitalization cases and, with the consent of the patient, to a physician who requests such clinical record in connection with or for the benefit of the patient.
>
> * * * * *
>
> Nonetheless, pursuant to the policy of the hospital, if a physician, with the consent of Mrs. Gotkin, requested a copy of her clinical record as a patient in Gracie Square Hospital, such record would be turned over to that physician."

While Dr. Lipkowitz later maintains that the physician need not be treating the patient (Appendix, p. A-69) his affidavit seems to add the additional element that the physician must be acting "for the benefit of the patient."

The District Court ignored this dispute among the doctors and hospitals referring only to the policy as outlined by Mr. Weinstein. But, more importantly, the Court ignored a substantial amount of evidence presented by Janet Gotkin which showed that the policy, as stated by Mr. Weinstein, was a sham.

Janet Gotkin wrote to Dr. Wallach on October 31, 1973, requesting access to her medical records. Appendix p. A-34. On November 14, 1973, Doctor Wallach (By Dr. Rubin) replied that:

> "Under the Provisions of Section 15.13 of the New York State Mental Hygiene Law, you must either obtain consent from the Commissioner of the Department of Mental Hygiene or make application to the New York State Supreme Court for and Order authorizing such examination of your record on notice to Brooklyn State Hospital and the Attorney General's office."

Thus, according to Dr. Wallach, it is state law and policy that no patient may receive his or her records unless he or she first receives the consent of the Commissioner or a court order, and he so advised Janet Gotkin. No mention is made of a medical screening mechanism or release to her doctor.

Other members of the class received different statements of the state policy from other agents of Dr. Miller. On July 31, 1973, a former patient's therapist received a letter from Anthony B. Correoso, M.D. (by Dr. Giannola) Director of Central Islip State Hospital in response to a request for copies of the patient's records. Dr. Correoso, an agent of Dr. Miller, and Dr. Wallach's equivalent, adivsed the therapist that:

> ". . .hospital records are privileged and confidential and can be made available only on an Order of a Judge of a New York State Court of Record." Letter to Louise Cooper, July 31, 1973. Appendix, P. A-38.

Obviously, the policy is different. Dr. Correoso will not release the records pursuant to Dr. Miller's permission, Dr. Wallach will. In addition, Dr. Correoso expressly

refuses to release the records to a former patient's therapist. But again no mention is made by those state officials of the Weinstein medical screening mechanism.

Dr. Miller publishes policies and regulations for the Department of Mental Hygiene in a "Policy Manual" and in official regulations. Yet, in neither place is there any reference to the medical screening procedure. Appendix, p.A-31. The policy manual of the Department does provide that "Directors may make accessible an abstract of the case record of a patient or former patient to . . . a reputable physician who is or was engaged to care for a patient of a member of his family." (New York State Department of Mental Hygiene Policy Manual §2902(b)(3)(a)) (emphasis added). In addition, the policy manual says that "physicians who make inquiries which are not considered in the best interests of the patient shall not receive any data as provided in this Section." (New York State Department of Mental Hygiene Policy Manual §2902(b)(4)(b)). See Plaintiffs' Memorandum of June 10, 1974, p. 21. The department's policy according to the policy manual is very different from the department's policy according to Mr. Weinstein.

Finally, appellants' counsel, both of whom work full-time on behalf of mental patients (and one of whom has so worked since 1968) both submitted affidavits stating that

their experience was that former patients could not receive their records. Appendix p. 32, paragraph 3 ("I have never heard, from any source, that former patients could gain access to their records if they submitted to a medical screening mechanism.") Appendix, p. A-36-A37, paragraphs 4 and 6 ("I know of no former patient who has been given access to his or her hospital records." and "He (Leon Rosenblatt, current President of Mental Patients' Liberation Project of New York City) does not know of any former patient who has been given his or her hospital record.").

In sum, Dr. Miller's and Dr. Wallach's policy according to Mr. Weinstein involves the medical screening mechanism referred to supra, p. 44 . Dr. Miller's policy according to his own policy manual is different, allowing only an abstract to be released, and only to a doctor treating a patient. Dr. Miller's and Dr. Wallach's policy according to Dr. Wallach is that records will be released only with the consent of Dr. Miller or upon court order. Dr. Miller's policy according to his agent, Dr. Correoso, is that records will only be released upon court order and will not be released to a therapist. Dr. Rabiner's policy is similar to the Weinstein screening mechanism but adds the requirement that only information "pertinent" to the physician's "goals" will be released. Dr. Lipkowitz's policy is similar to the Weinstein screening mechanism but adds the requirement that

information will only be released to a doctor when it is in the best interests of the patient. The policy of all doctors and hospitals according to the experience of counsel for appellants is that no former patient ever receives his or her records.

The existence or non-existence of a policy and its scope are critical to the issues in this case. See p. 45 supra. In addition, if the policy is as Janet Gotkin contends, that policy raises constitutional objections beyond those already discussed. Such a blanket policy would constitute an irrebuttable presumption and would quite clearly violate the substantive and procedural due process requirements established by the Supreme Court in Cleveland Board of Education v. La Fleur, 39 L.Ed.2d 52 (1974); Vlandis v. Kline, 412 U.S. 441, (1973); and Stanley v. Illinois, 405 U.S. 645, (1972). In each of those cases the Court noted that "permanent irrebuttable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments," and ruled that "the Due Process Clause required a more individualized determination" (e.g. 39 L.Ed. 2d at 62-63).

Yet despite the confusion just referred to, the District Court held that the policy was as Mr. Weinstein said it was, and that Janet Gotkin "conjured up" a dispute as to the facts. Appellants respectfully urge that the District Court erred in so holding and that, since this

crucial fact was in dispute, summary judgment was inappropriate.

B. The Merits Of The Hospitals' Interests In Refusing To Grant Former Mental Patients Access To Their Records Versus The Merits Of Former Patients' Interests In Such Access Is In Dispute.

As indicated in the Introduction and other sections, supra, a full exploration of the interests of the parties herein is critical to a resolution of the issues in this case. For example, the nature and substance of the due process mechanisms and safeguards depends largely on a weighing of the interests. But, the nature and quality of the interests of both parties are in very sharp dispute. As has already been noted, the District Court found that "it is not material to the issues presented in this case for this court to pass upon the wisdom of such a policy."* That misses the point. Appellants contention is not that the state policy is unwise, but that it is unconstitutional. Because there is sharp dispute over the factual basis for that policy, this Court should remand for an exploration and resolution of that dispute before proceeding to the resolution of the substantial constitutional issues raised by this case.

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*To the extent the District Court did rely on the statement of Mr. Weinstein explaining the reasons for their so-called policy, as he implicitly seemed to (over 5 of the 26 pages of the opinion discuss the wisdom of the policy, Appendix, pp. A-88 - A-93), the Court resolved the dispute in favor of the moving parties, the hospitals. Again (see A, Section II, infra), this was error.

1. The hospitals' reasons for non-access.

In examining the hospitals' reasons for non-access, we should keep in mind the admonition of the New York Court of Appeals which said, in giving an ex-patient access to his records, "It is clear that the privilege (doctor-patient) is that of the patient and that --- at least to a degree --- the State objects to the present application not in the interests of the patient but to protect itself." In re Warrington, 303 N.Y. 129, 136, 100 N.E.2d 171 (1951). The hospitals raise three objections. See Appendix, pp. A-20 - A-22.

"1. Medical Records ordinarily include information stated in technical medical terminology which might be misunderstood by an individual not medically trained." Appendix, p. A-21. It has never before been suggested that United States citizens should be given only that information which they will clearly understand. In addition, one would expect that if this is indeed the reason for the hospitals' policy, they would have disclosed to Janet Gotkin that information which she would obviously understand. She seeks access to her records to ensure factual accuracy, to obtain specific dates, her legal status at admission, etc. Yet no offer was made to grant access to even that information. Since no such offer was made, it seems obvious that this is an after-the-fact rationalization for a blanket, self-protecting policy of non-disclosure. Exactly this argument was made in Van Allen v. McLeary, supra, and rejected by the court.

In addition, appellants expect to establish through pre-trial discovery and at trial (a) that the hospitals herein are staffed primarily by attendants, not by doctors; (b) that the attendants are primarily responsible for implementing patient treatment plans; (c) that the attendants are inadequately trained and have received, on the average, very little formal education; (d) that the attendants, as part of their duties, are expected to read and understand the information contained in patient records; (e) that Janet Gotkin's understanding of "technical medical terminology" is superior to the understanding level of the average attendant.

Finally, appellees suggest no negative consequences of misunderstanding. So what if the patient misunderstands? What consequence of misunderstanding justifies non-disclosure? The only conceivable consequence is suggested by appellees in their second point. Thus, the first and second points, upon analysis, are seen to be the same.

"2. The revelation of some information in a former patient's record could be detrimental to the individual's current mental well being." Appendix, p. A-21. But, the hospitals made no attempt to separate the information which would obviously not be detrimental (date of admission, names of treating physicians, etc.) from that which would be.

They denied Janet Gotkin all access, both to information they believe would be detrimental and to that which everyone agrees would not be. Again, careful examination leads to the conclusion that the policy is designed to protect the hospitals, not Janet Gotkin.

The hospitals and doctors offered no expert testimony on this issue at all. Mr. Weinstein is not a doctor or a mental health professional. He is a statistician. He is certainly in no position to offer evidence on this highly disputed point.

In addition, the harms contemplated by the hospitals and doctors are completely speculative (notice it says the information could be detrimental, not that it will be), and speculative reasons are clearly insufficient to justify abridgment of constitutionally protected rights. Tinker v. Des Moines Community School District, 393 U.S. 503 (1969).

In addition, the courts, including this Court, have frequently rejected this exact reason for failing to acknowledge the rights of patients and former patients. See e.g., Winters v. Miller, 446 F.2d 65 (2nd Cir. 1971) cert. den. 404 U.S. 984; Commonwealth of Pennsylvania ex rel Rafferty v. Philadelphia Psychiatric Center, 356 F.Supp. 500 (E.D.Pa. 1973); see also cases cited in Introduction, supra.

Moreover, the evidence is overwhelming that psychiatrists simply cannot predict behavior. Dershowitz, after a review of the relevant psychiatric literature, concluded that "psychiatrists are rather inaccurate predictors -- inaccurate in an absolute sense . . ." Dershowitz, "The Psychiatrist's Power in Civil Commitments: A Knife That Cuts Both Ways," Psychology Today, February, 1969 at 47. Another psychiatrist has said that there is no "empirical support" for the belief that psychiatrists can predict dangerous behavior. Rubin, "Prediction of Dangerousness in Mentally Ill Criminals," 27 Arch. Gen. Psychiatry 397, 397-8 (1972) citing Kozol, Boucher, and Garofalo, "The Diagnosis of Dangerousness" a paper read to the annual meeting of the American Psychiatric Association, San Francisco, May 13, 1970. See also the hundreds of studies reviewed in Ennis and Litwack, supra.

In short, even assuming that the hospitals would use a medical screening mechanism such as Mr. Weinstein suggests, there is no reason to believe the doctor chosen could predict Janet Gotkin's response to seeing her records, and appellants expect to be able to prove that fact. This is an extremely important point. It suggests that the entire medical screening mechanism on which the hospitals rely, and which the District Court held to be constitutional, is based on a totally erroneous assumption of fact, and is indeed irrational.

But even if there were some merit to the hospitals' claim, Janet Gotkin and the class she represents are presumed competent. See A,2, Section I, infra. The presumption must be the opposite of that applied by the hospitals. It must be presumed that they will not be harmed by disclosure.

Moreover, it is not unreasonable to assume that full disclosure would never harm any patient. The affidavit by Dr. DiFuria submitted in opposition to the hospitals' motion suggests that is the case. See Appendix, p. A-27 - A-30. Dr. DiFuria is Superintendent of the largest mental hospital in the State of Washington and has followed a policy of complete disclosure since 1971 without any adverse result. Appendix, p. A-29.

In addition, the State of Hawaii now has a statute guaranteeing all patients, including mental patients, access to hospital records. §334-5, Mental Health, Mental Illness, Drug Addiction, and Alcoholism. That bill was sponsored by the Department of Mental Hygiene of the State of Hawaii. See, Standing Committee Report, Committee on Health, Hawaii State Senate Re: S.B. No. 995 (March 22, 1973). The United States law, like New York law, requires that all students over 18 be given access to all of their records, including psychological records, and without any exceptions. See A,1, Section I, infra.

Commentators have likewise suggested that records should be freely available. See, e.g. Fletcher, Morals and Medicine, Ch. 2 -"Medical Diagnosis: Our Right to Know the Truth" (Princetown U. Press, 1954); Shenkin and Warner, "Giving the Patient His Medical Record: A Proposal To Improve The System," 289 NE Journal Med., 688 (1973). In his "Citizens Bill of Hospital Rights," Pennsylvania Insurance Commissioner Herbert S. Denenberg says "The patient has a right to full information about his stay, including . . . access to his hospital records." After exhaustive study, the prestigious Secretary's Commission on Medical Malpractice of the Department of Health, Education and Welfare said in its report, "We believe that the patient has a right to the information contained in his medical record." Medical Malpractice, Report of the Secretary's Commission on Medical Malpractice, DHEW Publication No. (OS) 73-88, p. 76. Finally, after an extensive empirical test of giving patients their records, the University of Vermont Given Health Care Center concluded: "With very few exceptions we believe each patient who has had a complete evaluation should receive a copy of his medical record." Bouchard et. al., "The Patient And His Problem-Oriented Record" (unpublished paper on file at office of appellants' counsel).

In short, all available data suggests that patients, and especially former patients, will not be

harmed but helped, by access to their records. At the very least, a factual dispute exists on this issue, making summary judgment inappropriate.

"3. Information in an individual's medical record often includes references to other individuals, such as relatives, friends or former patients, which should remain confidential in order to protect the rights of those other individuals." Appendix, p. A-21.

Once again, the hospitals did not offer Janet Gotkin her records with such items deleted. Again, protecting themselves, not her or third parties, they denied her all access.

But as the hospitals themselves have recognized, "It is the purpose of Section 4504 of the Civil Practice Law and Rules to protect patients from the disclosure of confidential information imparted by them to their physician." Section 2903(b), Department Policy Manual, Department of Mental Hygiene, State of New York. See also, Westphal v. State, 79 N.Y.S. 2d 634 (Ct. of Cl., 1948); In re Warrington, supra; Ehrlich v. Gerstenhaber, 138 N.Y.S. 2d 702 (Sup. Ct., Kings Co., 1955); In re Greenberg's Estate, 89 N.Y.S. 2d 807 (Sup. Ct., Kings Co., 1949).

As those cases make clear, the doctor-patient privilege and the confidentiality of patient records are creatures of statute. No doctor-patient privilege existed

at common law. Westphal v. State, supra. The privilege belongs to the patient and may be waived only by the patient.

The hospitals would have this Court create a new privilege, one for relatives and friends of patients, that the New York State Legislature has not seen fit to enact. Courts have been notably reluctant to establish new areas of privilege. See, e.g., Branzburg v. Hayes, 408 U.S. 665 (1972) (rejecting newsman's privilege).

But perhaps most important is that no privilege can or should be recognized unless the parties involved (friends, relatives, etc.) had a reasonable expectation of privacy and confidentiality in their communications. However, under applicable case law (e.g., Specht v. Patterson, 386 U.S. 605 (1967); and Lessard v. Schmidt, 349 F.Supp. 1078 (E.D. Wisc., 1972)), it is clear that the patient has, in all civil commitment proceedings, a constitutional right to cross-examine witnesses against him or her. Should the patient request a hearing to oppose commitment or continued confinement, he or she would have the right to confront and cross-examine all persons who furnished information relevant to that issue. Accordingly, friends, relatives, etc., cannot furnish information in the "reasonable expectation" that it will be kept secret from the patient.

Finally, the hospitals have not claimed or offered

any affidavit that this particular plaintiff will not understand the contents of her record, that she will be adversely affected by the information in her record, or that her record contains information which third parties wish to keep confidential.

2. Some Reasons For Disclosure.

Janet and Paul Gotkin need Janet Gotkin's patient records in order to write an accurate account of Janet Gotkin's hospitalization. Other members of the class need to make important life decisions which may involve the release of their hospital records to employers and other third parties. Some may be about to marry or to decide whether to bear children. Some may be contemplating running for public office. Whatever the reason, they need to see their records in order to make intelligent decisions about their own lives. In numerous cases, the courts have held that access in such situations must be provided. See A,1, Section I, infra.*

In addition, to the DiFuria affidavit, Appendix,-A-27,A30, a number of commentators have suggested that it would be therapeutic to allow patients access to hospital records. See, supra, pp. 58-60. Access increases understanding. It increases communication and trust between doctor and patient. And it serves as a check on the accuracy of entries in the record. See, e.g.,Standing Committee Report,

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*Interestingly, the Secretary's Commission on Medical Malpractice concluded that limiting patient access to records increases malpractice litigation. Medical Malpractice, supra.

Committee on Health, Hawaii State Senate, Re: S.B. No. 995, (March 22, 1973). Indeed, since the very essence of psychiatry is the increasing of self-knowledge, access to records may be one component of the right to treatment recognized in, e.g., United States ex rel Schuster v. Herold, supra; Donaldson v. O'Connor, supra.

Appellants expect to be able to establish these and other benefits of disclosure through pre-trial discovery and at trial. Because a fact record is so important to the determination of the issues in this case, summary judgment is inappropriate.

CONCLUSION

For the reasons above, appellants respectfully ask the Court to reverse the District Court's order granting summary judgment, and to remand for a full and complete exploration of the facts.

Christopher A. Hansen
Mental Health Law Project
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Bruce J. Ennis
New York Civil Liberties Union and
Mental Health Law Project
84 Fifth Avenue
New York, New York 10011
(212) 924-7800

Attorneys for Plaintiffs-Appellants.*

Dated: New York,
New York

*Counsel gratefully acknowledge the assistance provided by Henry Fellman and Susan Agid, Law Students at Brooklyn and Columbia Law Schools; Wayne Braveman and Tom Litwak, Legal Assistants at the New York Civil Liberties Union.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Deborah Stead , being duly sworn, deposes and says, that on the 4th day of Nov., 1974, s/he served the annexed:

BRIEF FOR APPELLANTS

upon

Robert Conrad

Attorney(s) for Appellees , by delivering TWO (2) true copies thereof to said attorney(s) at:

Goldwater and Flynn
60 East 42nd St.
New York, New York 10047

BY MINUTEMEN MESSENGER SERVICE
(212) 354-6555

Deborah Stead

Sworn to before me this
4th day of November, 1974

Alan H. Levine

ALAN H. LEVINE, Esq.
NOTARY PUBLIC, State of New York
No. 31-2327215
Qualified in New York County
Commission Expires March 30, 1975

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Deborah Stead , being duly sworn, deposes and says, that on the 4th day of Nov. , 1974, s/he served the annexed:

BRIEF FOR APPELLANTS

upon Maria L. Marcus
Assistant Attorney-General

Attorney(s) for Appellees , by delivering TWO (2) true copies thereof to said attorney(s)

at: Attorney General of the State of New York
2 World Trade Center
New York, New York

By MINUTEMEN MESSENGER SERVICE
(212) 354-6555

Deborah Stead

Sworn to before me this
4th day of November, 1974

Alan H. Levine

ALAN H. LEVINE, Esq.
NOTARY PUBLIC, State of New York
No. 31-2327215
Qualified in New York County
Commission Expires March 30, 1975

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Deborah J. Stead , being duly sworn, deposes and says, that on the 4th day of November , 1974, she served the annexed: BRIEF FOR APPELLANTS

upon

Melvyn B. Ruskin

Attorney(s) for Appellees , by depositing TWO (2) true copies thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York, in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at:

Lippe, Ruskin & Schlissel, P.C.
114 Old Country Road
Mineola, New York 11501

Deborah Stead

Sworn to before me this
4th day of November 197

Alan H. Levine

ALAN H. LEVINE, Esq.
NOTARY PUBLIC, State of New York
No. 31-2327215
Qualified in New York County
Commission Expires March 30, 1976